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Nos. 88-464 and 87-1911

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY, *et al.*,
Respondents.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Petitioners,

v.

GUILFORD TRANSPORTATION INDUSTRIES, INC., *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Courts of Appeals for the First and Seventh Circuits

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SUPPLEMENTAL BRIEF OF PETITIONERS

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On Petitions for Writs of Certiorari to the United States Courts of Appeals for the First and Seventh Circuits

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SUPPLEMENTAL BRIEF OF PETITIONERS

In May 1988, petitioners Railway Labor Executives' Association [hereinafter, "RLEA"] and fifteen (15) of its member organizations filed a petition with this Court for a writ of certiorari to the United States Court of Appeals for the First Circuit, asking this Court to review the judgment of the First Circuit in *RLEA v. Guilford Transportation Industries, Inc.*, 843 F.2d 1383 (1st Cir.

1988) (table). On September 16, 1988, petitioner RLEA and fourteen (14) of its member organizations filed a petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit, asking this Court to review the decision of that Court in *Chicago & North Western Transportation Company v. RLEA*, 7th Cir., No. 88-1504, decided August 23, 1988. This Supplemental Brief is respectfully submitted by petitioners pursuant to Rule 22.6 of the Rules of this Court to bring to this Court's attention certain recent developments affecting these cases.

I. No. 87-1911, *RLEA v. Guilford Transportation Industries, Inc.*

A. Status Of the Arbitrated Implementing Arrangement

On June 12, 1988, an arbitrator issued an award devising the implementing arrangement required by Article I, Section 4 of the employee protective provisions imposed by the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] as a condition of the lease exemptions which petitioners in No. 87-1911 are asserting were entered into by Guilford to avoid the carriers' Railway Labor Act obligations. *See, Delaware & Hudson Ry. —Lease and Exemption*, 4 I.C.C.2d 322 (1988). Respondents asserted that the obligations imposed upon them by that implementing arrangement may render rail labor's claims in the case before this Court moot by providing the same relief which petitioners are seeking through this case. Respondents' Brief in No. 87-1911 at 21. Rail labor recognized that the implementing arrangement may affect the justiciability of this case, but noted that it was too early to determine the impact of either that arbitration decision, or of another arbitration award, on the continued existence of a case or controversy in this case. Supplemental Brief at 5-6. Rail labor respectfully submits that it is still too early to predict the

actual impact of the arbitration awards, but at present those decisions, especially the arbitrated implementing arrangement, have not affected the continued existence of a live case or controversy here. Moreover, subsequent developments in the implementing arrangement matter have emphasized the pressing need for this Court to grant the petition in No. 87-1911.

After the petition was submitted to this Court for consideration at the end of last term, the ICC issued a decision on July 15, 1988, staying the arbitrated implementing arrangement, pending administrative review by the Commission of that decision. That stay order has been reproduced herein as Appendix A. Guilford's rail carriers [1] subsequently filed a petition with the ICC on July 25, 1988, asking the Commission to set that arbitration award aside; RLEA responded on September 2, 1988. Since the Commission stated that it will issue "a final decision in this proceeding . . . no later than 45 days after the record is complete" (Appendix A at 2a), it is probable that the commission will issue its ruling on Guilford's petition by October 17, 1988.[2]

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[1] The "Guilford rail carriers" as used herein, refers to the Boston and Maine Corporation, Maine Central Railroad Company, Portland Terminal Company, and Springfield Terminal Railway Company. The Delaware & Hudson Railway Company has not participated in the ICC proceedings since June 20, 1988, and it is not actively participating herein because it is currently in reorganization under Subchapter IV of Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1161, *et seq.*, and is thus protected by the automatic stay of 11 U.S.C. § 362.

[2] On September 13, 1988, Guilford's rail carriers filed a motion with the ICC for leave to file a reply; that motion may extend the time in which the ICC will issue its decision, but such an enlargement, petitioners submit, appears unlikely.

B. Respondents, In Their Petition To The ICC To Set Aside The Arbitrated Implementing Arrangement, Have Admitted That They Entered Into The Leases To Evade Collective Bargaining Obligations

RLEA has asserted that this case, together with the two other petitions by RLEA in Nos. 88-464 and 87-2049, present the best vehicles of the many cases pending before this Court to resolve the important jurisdictional and conflict of laws issues arising from the ICC's and the railroads' contentions that the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*, preempts the Railway Labor Act, 45 U.S.C. § 151, *et seq.*, and makes that labor statute unenforceable. Pet. in No. 87-1911 at 24-25; Pet. in No. 88-464 at 15-16. One of the reasons advanced by petitioners for that assertion as to the "cert-worthiness" of this case, was their observation that the issues in No. 87-1911 were not clouded by a factual dispute. Pet. in No. 87-1911 at 24-25.

As stated above, Guilford's rail carriers, except for the Delaware & Hudson Railway Company, filed a petition with the ICC on July 25, 1988, to set aside the arbitrated implementing arrangement. That petition, rail labor respectfully submits, contains several admissions which make rail labor's observation that there are no factual disputes as to the intent behind the leases crystal clear. For example, the Guilford rail carriers stated as follows in describing the leases:

> Through the lease transactions, several railway companies serving the New England freight market and facing extreme financial hardship were able to consolidate their services and offer more competitive pricing by lowering labor costs. These savings were to be accomplished not by reductions in force, but through the elimination of obsolete and costly work rules that had plagued the operation of the railroads.

Guilford Pet. to ICC, dated July 25, 1988 at vi. Similar statements were made throughout that pleading, for Guil-

ford argued that the arbitrated implementing arrangement should be set aside because, by requiring the Springfield Terminal Railway Company to honor the lessors' collective bargaining agreements, the arbitrator failed to abide by the ICC's charge to him; as the Guilford carriers stated:

> Because the Commission in its prior order did *not* intend that work rules from the leased lines be carried over wholesale to the ST operation, the arbitration award here must be vacated as incompatible with the Commission's order [served February 19, 1988].

Guilford Pet., *supra*, at 29 (emphasis in original).

Rail labor continues to maintain that the case in No. 87-1911 presents an excellent vehicle to address the relationship between the transportation and the labor statutes,[3] for the record in that case, together with the ICC's actions in dealing with the manner in which employees should be treated by these leases, show the need for judicial, as contrasted with ICC, enforcement of the commands of the labor statute. Guilford has been able for the past twenty-one months to use the ICC's exemption powers under 49 U.S.C. § 10505 to abrogate rail labor's collective bargaining agreements, but petitioners have been unable to obtain judicial consideration of their challenge to that abrogation of contractual and statutory rights because the courts have viewed this subject matter as having been committed by Congress to the jurisdiction of the ICC. That denial of a judicial forum has, in effect, made the transportation Act and its policies paramount to the Railway Labor Act and its policies, even though Congress intended the two statutory schemes to exist side-by-side.

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[3] It should be noted that a petition for a writ of certiorari was filed on September 26, 1988, in *City of Galveston v. RLEA*, Sup. Ct. No. 88-517. That petition raises the issue of collateral attack comparable to that raised by RLEA in No. 87-1911, but in a 49 U.S.C.

II. No. 88-464, *RLEA v. Chicago & North Western Transportation Company*

A. Respondent Chicago & North Western Transportation Company Has Invoked the Mediatory Jurisdiction Of The National Mediation Board

Subsequent to the filing of the petition for a writ of certiorari in No. 88-464, *RLEA v. Chicago & North Western Transportation Company*, respondent Chicago & North Western Transportation Company [hereinafter, "C&NW], filed sixteen (16) applications with the National Mediation Board [hereinafter, "NMB"] for mediation under Section 5 First of the Railway Labor Act, 45 U.S.C. § 155 First. Those applications were filed on September 23, 1988, and requested that the Board mediate the disputes between rail labor and the C&NW growing out of the notices which petitioners in No. 88-464 had served upon the C&NW under Section 6 of the Railway Labor Act, 45 U.S.C. § 156, to negotiate agreements for employees affected by the Duck Creek South line sales. Respondent C&NW, however, stated in its cover letters to its applications for the Board's mediatory services that:

> The Carrier has and still does contest the validity of these [Section 6] notices and invokes the services of the National Mediation Board without waiving its objections to the validity of these notices.

E.g., letter from Ronald J. Cuchna, C&NW Vice President-Labor Relations, to C.R. Barnes, NMB Executive Director, dated September 22, 1988 involving Brotherhood of Maintenance of Way Employes.

Those requests for mediation were docketed by the NMB on September 23, 1988, as NMB Case Nos. A-12051 through, and including, A-12066. When it docketed those requests, the NMB sent a letter to each organization

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§ 10901 sale case similar to those pending in Sup. Ct. Nos. 87-2049 and 87-1888.

requesting comments. One of those letters is reproduced herein as Appendix B. In addition, the NMB stated that: "The parties are reminded of the status quo provisions of the Railway Labor Act." [4] Appendix B at 9a.

CONCLUSION

Petitioners respectfully submit that this Court should grant the writs in these cases. Moreover, petitioners continue to maintain that this Court should grant the writ in No. 87-2049, *RLEA v. C&NW*, which, when combined with the issues presented by these cases, should present the crucial issues in a manageable manner.

Respectfully submitted,

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Date: September 30, 1988

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[4] By quoting that admonition by the NMB, petitioners do not intend to convey the impression that this statement has any binding force on either party, for this Court has observed that: "[T]he Mediation Board has no adjudicatory authority with regard to major disputes, nor has it a mandate to issue regulations construing the [Railway Labor] Act generally." *Detroit & Toledo Shore Line R.R. v. UTU*, 396 U.S. 142, 158-59 (1969).

APPENDICES

APPENDIX A

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 30965 (Sub-No. 1)

DELAWARE AND HUDSON RAILWAY COMPANY—
LEASE AND TRACKAGE RIGHTS EXEMPTION—
SPRINGFIELD TERMINAL RAILWAY COMPANY

REVIEW OF ARBITRAL AWARD

DECISION NO. 2

Decided: July 8, 1988

Service Date: July 15, 1988

On June 22, 1988, Boston and Maine Corporation (B&M) and Maine Central Railroad Company (MEC) filed a petition for stay of an arbitrator's award issued pursuant to our decision in *D&H Ry.—Lease and Trackage Rights Exempt.—Springfield Term.*, 4 I.C.C.2d 322 (1988) (*Springfield Terminal*),[1] pending administrative review of the award.[2] The decision, unless stayed, becomes effective July 12, 1988. Portland Terminal Company (PT) and Springfield Terminal Railway Company (ST) indicated on June 23, 1988, that they join in the petition for stay.[3] On June 29, 1988, the Railroad [sic] Labor Executives' Association (RLEA) filed a reply in opposition to the railroads' petition for stay. The B&M, MEC,

[1] That proceeding embraced 17 additional notices of exemption.

[2] The carriers' petition for administrative review is due July 25, 1988.

[3] The Delaware and Hudson Railway Company (D&H), a party to the *Springfield Terminal* proceeding, filed a petition for reorganization under Chapter 11 of the Bankruptcy Code on June 20, 1988, and has not joined in the petition for stay.

ST and PT (herein "the GTI carriers" or "GTI") filed a motion for leave to file a sur-reply and a sur-reply on July 6, 1988. In the interest of obtaining the benefits of all arguments, the motion to file the sur-reply will be granted. *See* Finance Docket No. 28583 (Sub-No. 24), *Burlington Northern Inc.—Control and Merger—St. Louis-San Francisco Railway Co.*, served June 23, 1988, at 1. The petition for stay will be granted. We will expedite our consideration of GTI's petition for administrative review of the arbitral award, and a final decision in this proceeding will be issued no later than 45 days after the record is complete.

The decision in *Springfield Terminal* directed the parties to negotiate an implementing agreement for a series of lease transactions involving the rail carrier subsidiaries of Guilford Transportation Industries, Inc. (GTI), and, if an agreement could not be reached through negotiation, to submit the matter to arbitration. The parties' dispute was eventually submitted to an arbitrator, and an arbitral award was issued June 12, 1988.[4] The implementing agreement imposed by the award would require ST to apply the rates of pay, rules, and working conditions formerly required by the lessor carriers' collective bargaining agreements to its operations on the GTI system.

The decisions of arbitrators who resolve disputes arising out of labor protective conditions imposed by this Commission are treated as decisions of the Commission. *See United Transp. Union* v. *Norfolk & Western Ry.*, 822 F.2d 1114 (D.C. Cir. 1987), *cert. denied*, 108 S. Ct. 700 (1988). We have noted that arbitrators' decisions are not final orders and are subject to administrative review by this agency. *See* Docket No. AB-1 (Sub-No. 83), *Chicago & North Western Transportation Co.—Abandonment*, 3 I.C.C.2d 729 (1987) (*Lace Curtain*).

[4] The GTI carriers received a copy of the award on June 15, 1988.

In our decision in *Springfield Terminal*, we expressly stated that we would review any appeals from any arbitration decisions rendered pursuant to our directive that the parties negotiate an implementing agreement or, failing agreement, submit the matter to arbitration. Since the Commission in *Springfield Terminal* expressly provided that we would review an arbitrator's decision, the grant of a stay pending such review is particularly appropriate. The position of the petitioners is analogous to parties filing administrative appeals of right under 49 CFR 1115.2, where the timely filing of an appeal to an initial decision automatically stays its effect pending the appeal. In deciding the petition for stay, the guidelines set forth in *Washington Metropolitan Area Transit Commission* v. *Holiday Tours Inc.*, 559 F.2d 841 (D.C. Cir. 1977) have nevertheless been followed and applied to determine that the arbitrator's decision should be stayed pending appeal.

Petitioners B&M and MEC represent that the implementation of the arbitrator's decision, including the implementation of the B&M and MEC collective bargaining agreements in lieu of the agreements currently in effect on the ST system, would jeopardize the viability of their lines. In support, the GTI cites the recent bankruptcy and cessation of service of the Delaware & Hudson Railway Company (D&H), a GTI subsidiary. We precluded the D&H from leasing its lines to ST and it has remained subject to its existing collective bargaining agreement. In reply, RLEA argues that the GTI petitioners have not supported their allegations of irreparable harm, noting that the B&M and MEC were able to operate under existing work rules in the past. In addition, RLEA argues that the GTI carriers willingly accepted the obligation to comply with the arbitrator's award because they consummated the leases of the lines to ST before we ruled on the petitions filed by RLEA and others to revoke the class exemption pursuant to which the lease transactions were made.

The GTI petitioners argue that granting a stay will not irreparably harm other parties, *i.e.*, the employees affected by the arbitrator's decision, since interest will accrue on their claims for money damages and that those damages will continue to accrue during the pendency of the appeal should the GTI petitioners fail to prevail. By contrast, GTI would have no way to be compensated for expenses it incurred pursuant to the arbitrator's decision should it be reversed on appeal.

RLEA argues that the harm which would occur to the employees from a delay in implementing the arbitrator's award would outweigh any harm that would be incurred by GTI. Specifically, RLEA states that "it is impossible at a later date to undo the numerous and varied exercises of options which employees must exercise to earn a livelihood." RLEA notes that, at present, GTI is reinstating employees pursuant to a separate arbitration award concluding a dispute over safety practices on the carrier. RLEA states that reinstating these employees on a basis other than the seniority system established by the arbitrator would compound "an already highly inequitable, dangerous and harmful situation."

Both sides argue that the balance of equities and consideration of the public interest favor their positions.

In deciding whether to grant the stay, the Commission is charged, as the parties note, not only with balancing the equities affecting the parties but also with considering the effect of our action on the general public. Rail service in New England on the Guilford system has been in turmoil for some time. In our decision in *Springfield Terminal*, we sought to establish a procedure that would not only resolve the conflicting claims but would also provide a basis for the establishment of stable and dependable rail service for New England. While it is premature to state whether or not the Commission will overturn the award in reponse to GTI's appeal of the arbitrator's de-

cision, GTI has raised difficult and substantial legal issues and, therefore, a stay is warranted. If the appeal should be granted, failure to stay the arbitration decision would have created a situation where substantial changes made pursuant to the leases implemented under the class exemption were undone by the arbitrator's decision and were then reimposed. Those gyrations might be sufficient to reduce an already difficult situation to chaos. If the appeal is ultimately denied, the return to the B&M and MEC collective bargaining agreements can be implemented then, with no more and hopefully less friction than doing so now, since the GTI carriers would have had time to plan for the possible implementation of the arbitrator's award.

In addition, the allegation of the GTI carriers that the implementation of the award could impair their visibility and jeopardize service to shippers cannot be ignored. The bankruptcy of the D&H and its cessation of service, while not dispositive of the situation on the B&M and MEC, offers some parallels. It also offers the reminder that rail service can cease and its cessation can harm the public. If the GTI carriers are to be believed, this may happen anyway if the appeal is denied. However, as long as there is the possibility that the award may be overturned, the Commission should seek to avoid irreparable harm to public as well as private interests unless the harm to the interests affected by implementing the stay is more substantial. A delay in the implementation of the arbitrator's decision will chiefly result in an economic burden on the affected employees. While this harm is significant, it is, as the courts have found in upholding this Commission's *Mendocino* labor protective conditions,[5] compensable

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[5] *Aff'd sub nom. Railway Labor Executives' Association* v. *United States*, 675 F.2d 1248 (1982), *See* Finance Docket No. 30532, *Maine Central R.R., et al.—Exemption* (not printed), served September 13, 1985, *aff'd sub nom. Railway Labor Executives' Association* v. *ICC*, No. 85-1636 (D.C. Cir. March 16, 1987).

through reparations. This reparable injury does not outweigh the public's interest in the maintenance of reliable rail service in New England.

The U.S. Court of Appeals for the D.C. Circuit discussed the significance of the consideration of the public interest in *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F.2d 921, 925 (D.C. Cir. 1985) in stating:

> Where lies the public interest? In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interests of private litigants must give way to the realization of public purposes.

It is a "fundamental principle * * * that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" *American Power and Light Co.* v. *SEC*, 329 U.S. 90, 112 (1946), quoting *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 117, 194 (1941). *See also Atchison, Topeka and Santa Fe Railway Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 825 (1973).

On balance, the competing equities of the private parties and the consideration of the public interest support the grant of a stay pending administrative review by this agency of the arbitrator's decision.

This decision will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The arbitral award is stayed pending administrative review by the Commission.

2. This decision is effective on the dated served.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Sterrett, Simmons, and Lamboley. Commissioner Sterrett dissented and would have granted only a housekeeping stay until August 1, 1988, to evaluate whether a further stay would be appropriate in light of the carriers' petition to be filed by July 25, 1988. Commissioner Lamboley dissented with a separate expression.

[SEAL]

NORETA R. MCGEE
Secretary

COMMISSIONER LAMBOLEY, dissenting:

Given the relevant circumstances in this proceeding, I would not grant the request for stay.

APPENDIX B

NATIONAL MEDIATION BOARD
Washington, D.C. 20572

September 23, 1988

Case No. A-12059

Mr. Ronald J. Cuchna
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Chicago and Northwestern Transportation Co.
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Chicago, IL 60606

Mr. Geoffrey N. Zeh, President
Brotherhood of Maintenance of Way Employes
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Detroit, MI 48203

Gentlemen:

The Board is in receipt of an application for mediation from the Chicago and Northwestern Transportation Company covering a dispute between that Carrier and the Brotherhood of Maintenance of Way Employes, on the following subject:

> "The organization's demands for various forms of protective benefits for employees affected by sale of line segments."

Mr. Zeh is requested to furnish this office promptly with any statement he may care to make on behalf of the Organization.

This application has been docketed as our Case No. A-12059 and will hereafter be referred to by that number. A mediator will be assigned to mediate this dispute consistent with prior commitments.

The parties are reminded of the status quo provisions of the Railway Labor Act.

Sincerely,

/s/ Charles R. Barnes
CHARLES R. BARNES
Executive Director

CRB/ljb